IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27759-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CINDY MARIE UTTER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Cindy Marie Utter appeals her methamphetamine possession conviction. She contends the trial court erred in failing to suppress evidence of a glass smoking pipe containing a burnt residue seized from her open "junkie kit" seen in her open handbag by an officer conducting a welfare check. Because the facts show the officer lawfully observed the pipe in open view and immediately recognized it as contraband, no search occurred. *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986) (officers lawfully encountering contraband perceived with their senses may seize it, where the contraband is immediately recognized as such by the officers). Under the open view doctrine, no search occurred when the officer seized the pipe and

other contraband resting underneath it. We affirm.

FACTS

The majority of the facts are unchallenged and, therefore, are verities on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (stating that "challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal").

On October 26, 2007, Chewelah Police Officer Robert Pankey was dispatched to the Chewelah Safeway store for a welfare check. A Safeway employee had called and reported a woman was at the store stating that she had no place to go. Officer Pankey arrived at the store, and learned the woman had left. He was again dispatched to the store a short time later, and he found the woman at the front desk, just inside the front door of the store, by the movie counter. He introduced himself to the woman, and explained that he had received a call and he was checking on her well-being. He asked if he could help, and the woman explained that she had nowhere to go. Officer Pankey identified the woman as Ms. Utter. As they talked, Officer Pankey stood about three feet from Ms. Utter, and she was eating chicken she had been given by Safeway employees.

Officer Pankey noticed a medium-sized handbag on the movie counter. The handbag was open enough for him to see inside, and he saw a black eyeglass case

inside the handbag. The black eyeglass case was also open, and inside Officer Pankey could see a three to four inch glass tube partly covered with black residue. It was a pipe typically used to smoke methamphetamine. Officer Pankey recognized the black case as a "junkie kit." Report of Proceedings (RP) (May 14, 2008) at 24. Officer Pankey did not touch the handbag as he made these observations. In addition, Ms. Utter showed no concern for the handbag as they talked. Officer Pankey asked Ms. Utter, "Is that your handbag?" and Ms. Utter answered "Yes." Clerk's Papers (CP) at 18. Officer Pankey then asked her, "Is there any drug paraphernalia in the bag?" and Ms. Utter answered "No." CP at 18. Officer Pankey told Ms. Utter "I saw paraphernalia in the black case inside your bag", and Ms. Utter responded, "Oh that's my pipe. Can we go outside?" CP at 18.

Next, Officer Pankey and Ms. Utter went outside, and Officer Pankey brought the handbag. As they stood by Officer Pankey's patrol car, Officer Pankey put the handbag on the hood of the car. Officer Pankey removed the black eyeglass case from the handbag. The black eyeglass case would not close, as it contained cloths and other items. Inside the eyeglass case were the glass pipe, another glass methamphetamine pipe, and a marijuana pipe. Ms. Utter told Officer Pankey the items did not belong to her and that she had been clean for five years. Officer Pankey placed Ms. Utter in his patrol car. He did not look inside the handbag and returned it to Ms. Utter, who Officer Pankey cited for use of paraphernalia and was released.

The State charged Ms. Utter with one count of possession of a controlled substance, methamphetamine, in violation of RCW 69.50.4013(1), apparently based on the pipe residue. Ms. Utter moved to suppress the evidence. At a hearing on the motion to suppress, the court heard testimony from Officer Pankey. In addition to the facts stated above, Officer Pankey testified he asked Ms. Utter if he could search her handbag, and she responded, "Why would you do that?" RP at 23. Officer Pankey testified when he first looked into the handbag, he solely saw the glass pipe. He discovered the other items underneath the glass pipe when he opened the black eyeglass case outside to remove the glass pipe.

The trial court orally denied the suppression motion and later entered written findings of fact and conclusions of law. Ms. Utter proceeded to a bench trial on stipulated facts, and was found guilty as charged. Ms. Utter appealed.

ANALYSIS

The issue is whether the trial court erred in denying Ms. Utter's motion to suppress.

We apply a two-step review of the trial court's denial of a suppression motion. *See State v. Levy,* 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). First, we review the trial court's findings of fact under the substantial evidence standard. *Id.* (citing *State v. Mendez,* 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California,* 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)).

Further, "[u]nchallenged findings of fact are verities on appeal." *Id.* (citing *O'Neill,* 148 Wn.2d at 571). Second, we review de novo the trial court's conclusions of law. *Id.* (citing *Mendez,* 137 Wn.2d at 214). Here, Ms. Utter solely challenges the trial court's conclusions of law.

Ms. Utter first contends the evidence found during her encounter with Officer Pankey should have been suppressed because it came from a statement given under custodial circumstances without the benefit of *Miranda*[1] warnings. Specifically, Ms. Utter contends when Officer Pankey asked her "[i]s there any drug paraphernalia in the bag?" the encounter ripened into a seizure,[2] *Miranda* warnings attached. CP at 18.

"Whether an officer should have given *Miranda* warnings to a defendant depends upon whether the examination or questioning constituted (1) a custodial (2) interrogation (3) by a state agent." *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002) (citing *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992)). "A defendant is in custody for purposes of *Miranda* when his or her freedom of action is curtailed to a 'degree associated with formal arrest.'" *Id*. (quoting *California v. Beheler,* 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)). "Whether the defendant was in custody is a mixed question of fact and law." *Id*. (quoting *Thompson v. Keohane,* 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Although Ms. Utter argues her encounter with Officer Pankey constituted a seizure, the legal question for whether *Miranda* warnings are required is whether the encounter was custodial. *See Miranda*, 394 U.S. at 478-79.

"The factual inquiry determines 'the circumstances surrounding the interrogation.'" *Id*. (quoting *Thompson*, 516 U.S. at 112). "The legal inquiry determines, given the factual circumstances, whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id.* at 787-88 (quoting *Thompson*, 516 U.S. at 112). "[T]he reviewing court applies an objective test to determine the ultimate inquiry: whether there was a formal arrest or restraint of the defendant to a degree consistent with formal arrest." *State v. Rehn,* 117 Wn. App. 142, 153, 69 P.3d 379 (2003) (citing *Thompson,* 516 U.S. at 113; *Solomon,* 114 Wn. App. at 788). Statements obtained from a person during a custodial interrogation without the benefit of *Miranda* warnings are inadmissible.

Here, Officer Pankey spoke to Ms. Utter after being dispatched to the Safeway store to check on her welfare. As they talked, Officer Pankey stood about three feet from Ms. Utter, and she was eating chicken she had been given by Safeway employees. Officer Pankey did not prevent Ms. Utter from leaving. Under these factual circumstances, a reasonable person would have felt free to leave. *See Solomon*, 114 Wn. App. at 787-88. Accordingly, *Miranda* warnings were not required. *See id.* at 787.

We note that Ms. Utter contends that the physical evidence found by Officer Pankey, rather than any statements she gave, should have been suppressed as a result of his failure to give *Miranda* warnings. The requirement of *Miranda* warnings has been extended beyond statements: "Where a police officer's questioning or

requests induce a suspect to hand over or reveal the location of incriminating evidence, such nonverbal act may be testimonial in nature; the act should be suppressed if done while in custody in the absence of *Miranda* warnings." *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988). Nonetheless, this is not what occurred here. Ms. Utter did not hand over or reveal evidence to Officer Pankey, but rather, he found the evidence while standing in a lawful vantage point after looking in the open black eyeglass case inside Ms. Utter's open handbag. The discovery of the physical evidence was separate from the questioning of Ms. Utter.

Ms. Utter contends Officer Pankey's removal of the black eyeglass case from her handbag constituted an unconstitutional search, and that Officer Pankey illegally seized and searched the black eyeglass case. The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution both protect an individual's right to privacy from governmental trespass. *See e.g., State v. Rankin,* 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004). Warrantless searches and seizures are considered per se unreasonable unless they fall within one of the few and narrow exceptions to the warrant requirement. *Id.* at 695. "The State bears the burden of establishing an exception to the warrant requirement." *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

The State argues Officer Pankey had authority to seize the black eyeglass case under the "plain view doctrine." "The 'plain view' doctrine applies after the officer

intrudes into an area or activity where a reasonable expectation of privacy exists." *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000) (citing *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). "If the officer has made a justifiable intrusion and sights contraband, he can seize the evidence without a warrant." *Id*. (citing *Seagull*, 95 Wn.2d at 901-02). On the other hand, "the 'open view' doctrine applies when an officer observes contraband from a 'nonconstitutionally protected area.'" *Id*. (quoting *Kennedy*, 107 Wn.2d at 10). "Under the open view doctrine, when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a search." *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (internal quotation marks omitted) (quoting *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996)). Accordingly, "[t]he 'open view' observation is . . . not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant." *Lemus*, 103 Wn. App. at 102. "[C]ontraband observed in 'open view' is subject to seizure pursuant to a search warrant or one of the exceptions thereto." *Id*. at 104.

Here, contrary to the State's contention, the "open view" doctrine, rather than the "plain view doctrine" applies, because Officer Pankey viewed Ms. Utter's handbag from a non-constitutionally protected area. *See State v. Courcy*, 48 Wn. App. 326, 328, 739 P.2d 98 (1987) (stating "where officers view contraband from an area which is not

constitutionally protected, the 'open view' doctrine applies, not 'plain view'"). Officer Pankey observed Ms. Utter's handbag sitting on the movie counter at the Safeway store. The handbag was open enough for him to see inside, and the black eyeglass case was also open. Accordingly, Officer Pankey's observation of the glass pipe inside the eyeglass case was not a search, but rather, an open view observation "of 'that which was there to be seen.'" *See Lemus*, 103 Wn. App. at 103 (quoting *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991)).

Accordingly, after Officer Pankey lawfully viewed the glass pipe in open view, he was lawfully able to seize it immediately without a warrant during Ms. Utter's brief detention without the necessity of a full custodial arrest. From these facts, Ms. Utter was not free to leave once Officer Pankey initially observed what he recognized to be drug paraphernalia containing residue. Officer Pankey properly took control of the handbag and junkie kit in the process of placing Ms. Utter in his patrol car and removing the glass pipe from the junkie kit. Because the other contraband was immediately visible underneath the glass pipe, Officer Pankey retained the junkie kit as additional contraband evidence and returned the handbag to Ms. Utter. Officer Pankey did not have to execute a full custodial arrest of Ms. Utter. Instead he retained the option he exercised, to cite and then release her.

Considering our reasoning this far, we do not need to fully analyze the State's contention that exigent circumstances justified the seizure. A search without a warrant

may be justified if exigent circumstances exist that may "result in the destruction of evidence or endanger the safety of officers or third persons." *State v. Carter,* 151 Wn.2d 118, 128, 85 P.3d 887 (2004) (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)). "Whether exigent circumstances exist must be determined by the totality of the circumstances." *Id*. (citing *State v. Patterson*, 112 Wn.2d 731, 735-36, 774 P.2d 10 (1989)). Returning the contraband to Ms. Utter, who Officer Pankey cited and released, would likely have resulted in the destruction of the evidence.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.